No. 12895

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, a Sovereign State, and SMITH TROY, Attorney General of the State of Washington,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

STATE OF WASHINGTON, a Sovereign State, and SMITH TROY, Attorney General of the State of Washington,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE AND CROSS-APPELLANT

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United States Attorney

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JURISDICTIONAL STATEMENT [1]

The defendant accepts plaintiffs' jurisdictional

[1] Since consolidated cross-appeals are involved herein, the several parties are referred to in this Brief, for the purposes of convenience and avoidance of confusion, by their respective designations in the court below, that is, the State of Washington, and Smith Troy, Attorney General of the State, are referred to herein as "plaintiffs" and United States of America, defendant, and cross complainant below, is referred to herein as "defendant".

statement with the reservation that the cause of this action, as stated therein on the part of plaintiffs, to-wit, "to recover money the state was required to expend as a result of the negligence of an agent of the United States of America while acting within the scope of his authority," is plaintiffs' contentions and not a statement of fact.

STATEMENT OF PLEADINGS AND FACTS

On December 9, 1947, plaintiffs filed their original complaint on the present cause of action in the District Court as civil cause No. 1083, which, on motion of defendants therein named and after argument, was dismissed by the court on jurisdictional grounds on May 20, 1948, without prejudice and without costs. (R. 14).

On June 4, 1948, plaintiffs filed their second complaint on the present cause of action with the District Court as civil cause No. 1137, to which defendant on July 21, 1948, interposed its motion to dismiss on the principal ground that the suit was barred by the statute of limitations, pursuant to and in agreement with said motion the parties entered into a stipulation dated January 10, 1949, that the suit be discontinued without costs, and upon that stipulation the action was dismissed without costs by the order of the court January 17, 1949. (R. 14, 38-46).

On March 1, 1950, plaintiffs filed their third complaint on the present cause of action, to which defendant on April 24, 1950 filed its answer and cross-complaint, and a reply by plaintiffs was made June 1, 1950, following which it was stipulated October 31, 1950, that plaintiffs might file an amended complaint, and the answer to the original complaint should stand as an answer to the amended complaint, and thereafter on December 11, 1950, the plaintiffs, with leave of the court, filed their second amended complaint, (R. 3-10), to which defendant filed its amended answer and cross-complaint December 15, 1950, and the plaintiffs their reply on December 18, 1950, (R. 10-20), and upon the last mentioned pleadings of the parties this action was tried before the court on December 18 and 19, 1950. (R. 49-131).

Thereafter on January 9, 1951, the District Court made and entered its findings of fact and conclusions of law, (R. 21-26), and based thereon its judgment denying recovery to plaintiffs on their action and to defendant on its cross-action and awarding costs to defendant. (R. 27-30). From that final judgment denying plaintiffs and the defendant their respective relief, notice of appeal was filed by plaintiffs and defendant on March 8, 1951.

The facts material to a determination of the questions on appeal, as disclosed in the record, may be summarized as follows:

That at or about 4 P. M. on March 9, 1945, pursuant to a verbal understanding and agreement of some years existence between the fire department of the City of Vancouver, Washington, and the Army fire department at Vancouver Barracks, assuring mutual and reciprocal assistance to be rendered each other in time of need, a call was received at the Army Post Fire Station from the city fire department for a government fire truck to stand by at the city fire station while the civilian fire department attended a fire call.

In response to the said call a government fire truck, driven by Corporal Clarence B. Nelson and accompanied by two other enlisted fire fighters was immediately dispatched and proceeded westward along a designated route on West 10th Street in Vancouver, at a speed of approximately thirty miles per hour with its red light lit and fire siren being sounded continuously. When the fire truck reached the intersection of 10th and Washington Streets, the latter an arterial street, its speed was reduced to about 25 miles per hour, and without stopping or observing any obstructing traffic the fire truck proceeded to cross

said intersection and had reached the center thereof when a state patrol car going southward enroute to headquarters also proceeded into the center of said intersection, and its left rear was struck by the fire truck and the impact knocked the patrol car some 20 feet, throwing the patrolman out of the car and injuring him to the extent of the amount of compensation paid to him by the state, $3,671.56 on his assigned claim, and such collision damaging the fire truck in the sum of $60.76, the amount of repairs required on that account.

The driver of the fire truck, without tarrying at the scene of the accident proceeded, on his orders, the distance remaining to the city fire station, and upon arrival "dispatched the ambulance out to pick up the patrolman". (R. 103).

QUESTIONS PRESENTED

1. Was the Army fire truck, dispatched to the city's assistance upon summons by the Vancouver Fire Department to stand by at city fire station while city fire equipment answered a fire call, responding to an "emergency" call within the meaning of the Washington law?

2. Was the failure of Eldon Parke, State Patrolman, to bring his car to a stop and yield the

right of way after first hearing a siren some 200 feet north of the intersection and nevertheless proceeding on into the intersection of W. 10th and Washington Streets in the city of Vancouver, Washington, enroute to his headquarters, the proximate cause of the accident and resulting damages when his car so proceeding was struck at the intersection by the Army fire truck bearing a front red light and sounding its siren while enroute to the city fire station as a standby fire truck?

3. Aside from the nature of call being answered by the Army fire truck with regard to question of emergency, was the state patrolman guilty of contributory negligence when he heard the siren of a fire truck before he reached the intersection and notwithstanding failed to heed its warning or to do anything to avoid the impending accident?

4. Under Rule 41(b) of the Federal Rules of Civil Procedure for District Courts, did a dismissal of a prior complaint between the same parties on the same cause of action, when it was not otherwise specified in the order of dismissal, operate as an adjudication upon the merits, and render the same matters alleged in plaintiffs' second amended complaint herein res adjudicata?

STATEMENT OF POINTS

I.

That the United States is entitled to recover the amount of its damages claimed in its cross-action.

II.

That the District Court erred in concluding that the United States was not entitled to recover judgment on its cross-action, and in refusing to grant judgment thereon in the amount of $60.76 the amount of damages found by the court.

III.

That the plaintiffs, appellants, and cross-appellees herein, are not entitled to recover on their cause of action herein for each and all of the following and separate reasons, namely:

1. That defendant's fire truck was an emergency vehicle, as defined by law, on an emergency call and was entitled to the right of way, and the failure and neglect of plaintiffs' vehicle to yield the the right of way was the proximate cause of the accident.

2. That regardless of the nature of the call being answered by defendant's fire truck, plaintiffs'

driver was guilty of contributory negligence when he heard the siren and failed to observe the fire truck and failed to do anything to avoid the accident.

3. That the cause of action set up by plaintiffs in their present action was heretofore dismissed in a prior action between the same parties, and pursuant to Rule 41(b) of Federal Rules of Civil Procedure, such dismissal, not otherwise specified in the order, operated as an adjudication upon the merits, and the matters alleged in the complaint are and have become res adjudicata.

ARGUMENT

1. THE ARMY FIRE TRUCK, WHEN DISPATCHED TO THE CITY'S ASSISTANCE UPON SUMMONS BY THE VANCOUVER FIRE DEPARTMENT TO STAND BY AT CITY FIRE STATION WHILE THE CITY FIRE EQUIPMENT ANSWERED A FIRE CALL, WAS ACTUALLY RESPONDING TO AN EMERGENCY CALL WITHIN THE MEANING OF THE WASHINGTON LAW.

Since there is a lack of judicial construction of the pertinent statutes of Washington enacted in 1937 and made applicable and uniform throughout the state, as provided by Rem. Rev. Stat. Section 6360 - 2, it appears necessary to review prior decisions of the Supreme Court of Washington, as well

as cases beyond its jurisdiction in order to see what meaning has been given to the term, "responding to an emergency call" and similar language expressing response to urgency.

The pertinent portion of Section 6360-5 of Rem. Rev. Stats. of Washington, applicable to this case, reads as follows:

> "The provisions of this act shall be applicable to the operation of any and all vehicles upon the public highways of this state except that they shall not apply in the following cases:
>
> (a) To any authorized emergency vehicle properly equipped as required by law and actually responding to an emergency call or in immediate pursuit of an actual or suspected violator of the law, within the purpose for which such emergency vehicle has been authorized: Provided, That the provisions of this section shall not relieve the operator of an authorized emergency vehicle of the duty to operate with due regard for the safety of all persons using the public highway nor shall it protect the operator of any such emergency vehicle from the consequence of a reckless disregard for the safety of others: Provided, further, The provisions of this section shall in no event extend any special privilege or immunity in operation of an authorized emergency vehicle for any purpose other than that for which the same has been authorized; * * *."

In 1925, prior to the above enactment, the Supreme Court in *Hadley v. Arms & Scott*, 136 Wash. 632, at page 634 observed:

> "There is an ordinance of Seattle that gives fire apparatus, when responding to emergency fire calls, the right of way over all streets. There is, also, an ordinance requiring all vehicles, upon the approach of fire apparatus to go to the nearest right hand curb and stop parallel with the curb."

And in *Benefiel v. Eagle Brass Foundry*, 154 Wash., 330, at page 332, the Supreme Court quoted and discussed traffic Ordinance No. 53223 of the City of Seattle, and the pertinent section, as follows:

> "Section 22. Right of Way: Vehicles of the fire department, when going to, on duty at, or returning from a fire, shall have the right-of-way over all vehicles and persons. Every operator of a vehicle upon the approach of the apparatus of the fire department, shall immediately proceed to the right hand curb and come to a full stop standing parallel thereto, * * *
>
> It shall be unlawful for any person operating any vehicle, street car, locomotive or railroad car, in or upon any street, or for any person standing or walking in any such street, to fail, refuse or neglect to allow the right-of-way to apparatus or members of the fire department, when the same is *going to, on duty at, or returning from a fire.*" (Italics ours).

After discussing former decisions covering the governmental status of firemen and that speed laws were not applicable to such officials, the Supreme Court, at page 334 stated:

> "Following the rule laid down by these cases, and subject to the limitations therein pointed out,

we conclude that persons in control of fire apparatus belonging to a regularly established fire department are not, in using the streets of their city in responding to fire alarms, bound by the speed limits fixed by ordinance for ordinary traffic."

This court in 1918 in the case of *Puget Sound Electric Ry. v. Benson*, 253 Fed. 710, construed a prior Seattle ordinance containing the term "emergency calls" and at page 711 thereof had this to say:

> "All alarms of fire are emergency calls, and police patrol wagons are brought into service whenever their use is thought to be convenient. So that the supposed qualifying words "responding to emergency calls" would seem to be redundant and useless as applying to these antecedents. They have a peculiar fitness, however, when applied to ambulances. When acting under emergency, it is essential that ambulances move swiftly until the call has been attended to, without reference to the direction in which they are required to travel, whether to or from; hence the need of according them the right of way upon the streets until the emergency has been met. Otherwise, ambulances are to be afforded no greater privileges upon the streets than other vehicles. On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance."

The reasoning of this court in the *Benson case, supra,* should be as applicable now as then.

Taking up plaintiffs' cases cited in support of their specifications of errors, we agree with plaintiffs' conclusion that none of their cases quoted in their brief are fully in point.

Plaintiffs in their Brief at page 18, cite and quote from the case of *Lucas v. City of Los Angeles,* 10 Cal. (2d) 476, 75 P. (2d) 599. It is interesting to note that the two cases relied on by the Supreme Court of California, and quoted in that quoted part of the opinion, as illustrative of arbitrary exercise of privileges, involve instances where the operator of the police car was "cruising" around and not on patrol duty. In each instance it was held to be a question for the jury to decide whether or not the police officer was responding to an "emergency" call at the time the accident happened.

Plaintiffs in their first specification of error seem to question the authority of the Army to send a fire truck into the confines of the city without express authority for so proceeding.

While there is nothing in plaintiffs' pleadings or evidence to establish that Corporal Clarence B. Nelson, driver of the Army fire truck was acting

within the scope of his office or employment, as would, pursuant to the Federal Tort Claims Act, 28 U.S.C. 931 et seq., show consent of the government to be sued under the doctrine of respondeat superior, still the plaintiffs cannot take the position that the driver was on an unauthorized trip in order to establish that he did not have the right of way, and at the same time ask that the government be held liable for acts done in the scope of employment.

In *Rollow v. Ogden City*, 66 Utah 475, 243 Pac. 791, also cited in plaintiffs' Brief, the Supreme Court of Utah, in discussing an accident involving a stand-by fire truck from a substation going to the central station, at page 794 of its decision, stated:

> "Whereas, here a municipality exercises governmental functions in operating fire apparatus, and a statute is passed for the purpose of regulating the speed of vehicles generally, it will not be assumed that the regulation was intended to apply to the operation of such fire apparatus unless such intention is couched in express terms or is manifested by necessary or unavoidable implication. Fire trucks are used for special purpose only, and are not used or intended to be used upon the streets or highways for either pleasure or business purposes, and hence, do not come within the designation of ordinary vehicles."

The same is true even though the fire attended by a city fire department is outside the city limits.

See *McCarthy v. Mason*, 171 A. 256.

The Supreme Court of Wyoming in *White v. City of Casper*, 249 P. 562, in reviewing exemptions similar to the Washington Statute, summed up the case for fire protection in its concluding remarks:

> "We think that the exemption mentioned in the Statute above quoted contemplates that an actually existing fire in the city is an emergency which justifies excessive speed, and that the men operating the fire department may construe it to be such. Whether a fire in a city is or is not of a grave character cannot, in many cases, be determined in the first instance. It may or may not be, depending on many different circumstances. A fire that at a casual glance would appear insignificant might, under favorable conditions, be turned into a conflagration. We cannot believe that the Legislature intended that the character and extent of the fire must, in order to justify excessive speed, be determined beforehand — and that at the peril of the city."

2. THE FAILURE OF ELDON PARKE, STATE PATROLMAN, TO BRING HIS CAR TO A STOP AND YIELD THE RIGHT OF WAY AFTER FIRST HEARING A SIREN SOME 200 FEET NORTH OF THE INTERSECTION AND NOTWITHSTANDING PROCEEDING ON INTO THE INTERSECTION OF W. 10th AND WASHINGTON STREETS IN THE CITY OF VANCOUVER, WASHINGTON, ENROUTE TO HIS HEADQUARTERS, WAS THE PROXIMATE CAUSE OF THE ACCIDENT AND RESULTING DAMAGES, WHEN HIS CAR SO PROCEEDING WAS STRUCK IN THE INTERSECTION BY THE ARMY FIRE TRUCK SHOWING A FRONT RED LIGHT AND SOUNDING ITS SIREN WHILE ENROUTE TO THE CITY FIRE STATION AS A STANDBY FIRE TRUCK.

On cross-examination (R. 82-83), witness Parke testified as follows:

"Q. Mr. Parke, you say that when you were here (indicating) you first heard the siren in this position (indicating) number one?

A. No, I believe that is when I first saw the truck. When I first heard it, it would have been two hundred feet north of there.

Q. Farther this way? A. Yes, sir.

Q. Then what did you do when you first heard this siren?

A. I looked to see where it was coming from, to locate it.

Q. You didn't move, then, to the side and park?

A. No."

Here was a state patrolman who, far above the ordinary individual, knew the importance of a siren, and yet he testified that the effect of the siren upon him was negative, except that it caused him to look to see if he could detect its source.

In the foregoing connection there is also a Washington Statute which provides for safety when a siren is heard by a driver of a vehicle. This is Section 6360-93 of Remington's Revised Statutes, the pertinent portion of which is as follows:

> "Upon the immediate approach of an authorized emergency vehicle, when the driver is giving audible signal by siren, exhaust whistle, or bell, the driver of every other vehicle shall yield the right of way, and shall immediately drive to a position parallel to, and as close as possible to the right hand edge or curb of the public highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a peace officer."

There is nothing in the foregoing statute which authorized the state patrolman returning to headquarters to determine whether or not the siren belonged to a vehicle answering an emergency call or to otherwise inquire into its character and position.

When the patrolman heard the siren in time to do so, and failed to comply with the statute requiring him to stop, he was guilty of negligence, and for

such reason was liable to defendant, the owner of the fire truck, for its damages, and the defendant was entitled to recover the same on its cross-action and judgment should have been entered in the amount thereof in addition to defendant's costs of action.

We cannot agree with plaintiffs' statement at the bottom of page 23 of their Brief, namely, "Parke had entered the intersection before he heard a siren. (Tr. 75)," when his testimony indicated distinctly that he first heard it some distance before the intersection. (R. 82).

The plaintiffs' driver "knew, or in the exercise of ordinary prudence should have known of the approach of such fire apparatus, in time to have allowed said right of way," and by reason thereof the failure to allow the right of way was negligence and as a proximate result, defendant incurred damages to its fire truck.

See *Balthasar v. Pacific Electric Ry. Co.*, 202 P. 37, 41.

Plaintiffs cite cases in their Brief as instances of the negligence of the driver of the fire truck, none of which appear applicable here.

In *Muhs v. Fire Ins. Salvage Corp. of Brooklyn*, 85 N.Y. Supp. 911, cited by plaintiffs, the fire patrol

wagon was driven as fast as the horses could gallop, according to witnesses to the accident, and there was no attempt made to slacken their speed until the collision was imminent, and a policeman, rescuing a woman and child from a crosswalk was struck.

The evidence here is to the effect that the defendant's driver did slacken his speed as he approached the intersection involved.

Again, in *Ferraro v. Earle et al*, 105 Vt. 243, 164 Atl. 886, where the trial court's instruction was to the effect the fire truck must obey a traffic signal the same as others, the Supreme Court of Vermont reversed the judgment on verdict in favor of driver of the car in which the plaintiff was a passenger, and remanded the cause.

We fail to see where, in the absence of evidence in support thereof, the cases cited by plaintiffs can establish that defendant's driver did not operate the fire truck with due regard for the safety of others, and the patrolman in particular, "the only fact questions being whether there was an emergency call, whether statutory warning of vehicle's approach was given, and whether operator arbitrarily exercised his statutory privileges." . . .

Coltman v. City of Beverly Hills, 105 P. (2d) 153.

3. ASIDE FROM THE NATURE OF CALL BEING ANSWERED BY THE ARMY FIRE TRUCK WITH REGARD TO QUESTION OF EMERGENCY, THE STATE PATROLMAN WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN HE HEARD THE SIREN OF THE FIRE TRUCK BEFORE HE REACHED THE INTERSECTION AND NOTWITHSTANDING FAILED TO HEED ITS WARNING OR TO DO ANYTHING TO AVOID THE IMPENDING ACCIDENT?

In addition to cases and statutes heretofore cited and quoted, which are applicable here, the case of *Hartnett v. Standard Furniture Co.*, 162 Wash. 655 affords a similar example as here of contributory negligence on the part of the private motorist. There at page 667, the court said:

> "It follows that, even if the green light invited him (the motorist) to enter the intersection (the verdict reflects the refusal of the jury to accept that testimony as true) the danger of collision was so apparent it was the duty of appellant (motorist) to yield the right of way. Though the vehicle on which respondent was riding was not a fire truck upon a pressing errand, the situation depicted by appellant's driver is one where it was the duty of such driver, though entitled by ordinance or statute to the right of way, to yield the right of way to the approaching vehicle."

The quotation in plaintiffs' Brief at page 25, from the case of *City of Lansing v. Hathaway*, 280

Mich. 87, 273 N.W. 403 involving a collision between a fire truck and a private automobile does not reveal the true situation, as summarized in headnote 2 of the decision, namely:

> "A motorist was not liable for injuries sustained by firemen and for damage to fire truck which collided with automobile at street intersection where, at time of collision, there was a severe rainstorm and motorist proceeded with green light in his favor and had no warning of approach of fire truck, which proceeded with red light against it."

Certainly, it cannot be said that Eldon Parke's failure to heed the siren's warning can be assessed against the elements.

See also, *Russell v. Nadeau*, 29 A. (2d) 916.

4. UNDER RULE 41(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR DISTRICT COURTS, A DISMISSAL OF A PRIOR COMPLAINT BETWEEN THE SAME PARTIES ON THE SAME CAUSE OF ACTION WHEN IT WAS NOT OTHERWISE SPECIFIED IN THE ORDER OF DISMISSAL, OPERATED AS AN ADJUDICATION UPON THE MERITS, AND RENDERED THE SAME MATTERS ALLEGED IN PLAINTIFFS' PRESENT COMPLAINT HEREIN RES ADJUDICATA.

The effect of an involuntary dismissal is set forth in Rule 41(b) as follows:

"Unless the court in its order for dismissal

> otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

The District Court in *Cornell v. Chase Brass & Copper Co., Inc.*, 48 F. Supp. 979, 981, in discussing dismissals under Rule 41(a) stated:

> "That rule distinguishes between dismissals by notice and dismissals by stipulation. A notice or a stipulation of dismissal which is silent on the question of prejudice is made to operate without prejudice. After one dismissal by plaintiff the Rule provides that only a dismissal by notice shall operate as an adjudication. There is nothing in the Rule to indicate the parties may not, in such event, expressly stipulate that the dismissal shall be without prejudice."

A conceded dismissal pursuant to motion of defendant made under Rule 41(b) should not be held, it is contended, to conform to any method of dismissal provided for in Rule 41, and for such reason should operate as an adjudication upon the merits.

The rule intended involuntary as well as voluntary dismissals to so operate on the merits. It would, therefore, appear strange to defendant to consider that this rule contemplated that dismissal pursuant to a motion for dismissal on grounds not conceded by plaintiff would result in a determination on the merits and on the other hand if conceded or stipulated

therefor by plaintiff, the same would not be considered determination or dismissal on the merits.

CONCLUSION

The soldier driver delivered the standby fire truck to the City of Vancouver, equipped for fire fighting and pursuant to call for aid.

The run to the city fire station was made at a busy hour on a route that traversed the congested area of the city with the result that only one vehicle contested the right of way of the fire truck, namely, the driver of the state car, a state patrolman, who heard the siren and did nothing about stopping or parking his vehicle.

For the foregoing and allied reasons herein appearing it is contended that the judgment of the court below denying plaintiffs' relief on their action and awarding costs to defendant should be affirmed, and in so far as it denies relief to defendant on its cross-action that part should be reversed and judgment granted for defendant thereon in the amount of its claim.

Respectfully submitted,

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